Dalton Roofing Service, Inc. *and* Local 70, United Union of Roofers & Allied Trades, AFL–CIO. Case 7–CA–42317

June 21, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 25, 2000, Administrative Law Judge Richard H. Beddow, Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

The judge found that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire Sam Bono, Adam Aguilar, and Raul Aguilar because of their union affiliation, and violated Section 8(a)(1) of the Act by changing its application policy to require that applications be completed on Respondent's premises. We find, contrary to the judge, that the General Counsel failed to meet his burden of proof on these allegations. In particular, we disagree with the judge that the General Counsel satisfied his initial burden of showing by a preponderance of the evidence that antiunion animus contributed to Respondent's actions.

II. FACTUAL BACKGROUND

The Respondent is a nonunion roofing contractor. Each of its seven operating divisions is staffed with a superintendent, foreman, and roofers. Roofers earn between $8 and $12 an hour and perform both roofing work and related less skilled general labor work.

Cecil Male is the Respondent's owner, president, and CEO. He has sole authority to hire and determine wage rates. All applicants for employment with Respondent must interview with Male to be considered for employment. Applicants must either submit their applications when Male is available to interview them or contact him directly afterwards. Male does not call applicants to arrange interviews.

The Respondent has no written hiring procedures. Cindy Morrison, Male's daughter, is responsible for application intake, though Male's wife sometimes accepts applications. If Male is available after an applicant has completed his application, Morrison arranges for an immediate interview with Male. If Male is not available, Morrison tells the applicant to call back and arrange for an interview and she puts the application on Male's desk. When Male is finished with an application, he returns it to Morrison, who places the application in a file. Applications remain valid for 30 days.

During 1999,[2] Respondent needed additional roofers. Male discussed this need in an article in a trade magazine, ran newspaper advertisements, and placed a hiring sign outside the facility. Between April and the end of the year, over 100 individuals submitted applications and Male hired 65 of them.

In March, the Union, as part of an organizing effort, directed members to submit applications for employment with Respondent. The Union's first effort occurred on March 30, when Sam Bono, the Union's director of organizing, went with fellow organizer, Jim Bell, to Respondent's office to request applications. Both men wore union hats and jackets. While obviously aware of their union affiliation, Morrison said that Respondent was hiring and allowed them to take applications to be completed and returned at a later date. Bono and Bell testified that they submitted completed applications on April 7, but the judge found their testimony questionable and did not find a failure to hire on that date.[3]

On April 5, Bono encouraged brothers Adam and Raul Aguilar to apply for work with Respondent. Both Aguilars testified about their visit to Respondent's office. By their account, an unidentified woman gave them applications. In response to her question about their experience, Adam asserted that he was a "roofing machine." An anonymous young man present in the office, referred to by the judge as "John Doe," asked the brothers about their union status (Raul was wearing a union hat) and why they wanted to leave a union company for a "merit company." Adam responded that they were currently commuting to work and no longer wished to do so.

Doe then asked about their qualifications. The Aguilars replied that they worked on most of the roofing systems Doe mentioned. When questioned about wages, Raul told Doe that his last hourly wage was $15. Adam testified at the hearing that his last hourly wage was $21.04, and that he put that on his application. Both men told Doe that the job, rather than the money, was important to them. Doe said Respondent started at $8–9 an

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Unless stated otherwise, all dates are in 1999.

[3] Bono had no copies of these alleged applications. He did have copies of all subsequent union job applications to the Respondent. In addition, Bono stated in his May 9 application that he had not previously applied to the Respondent.

hour but discussed hourly rates of $11–$12 for Raul and $13 for Adam in light of their experience. Doe said he would "let the old man know and would get back to them within a week." When no one contacted them within a week, both brothers called Respondent about the status of their applications. They left messages with the person who answered the phone, but did not hear back. Respondent's files did not contain either brother's application.

On April 13, Bono submitted applications for seven union members, but each application mistakenly contained a second page from another company's application form and lacked the "certification" page from the Respondent's form. The judge found these applications were invalid because they were not in compliance with Respondent's regular hiring requirements.

On May 2, Bono returned to Respondent's office, asked if Respondent was still hiring and obtained another application. On May 9, Bono submitted applications for himself, Bell, and the seven union members for whom he submitted applications in April. Bono signed each applicant's name on the required certification page.[4] Male later noticed the differences between the handwriting on the April 13 applications and the signatures on the certification page of the May 9 applications. He therefore disregarded the May 9 applications. The judge found that only Bono's application on May 9 was valid.

On June 15, Bono resubmitted an application for himself, Bell, and the seven other union applicants. These were exact copies of the applications submitted on May 9. Consequently, the judge found that all applications signed by Bono on behalf of others were invalid. Morrison accepted these applications but told Bono at the time that Respondent had a new policy requiring applications to be completed in Respondent's office. Bono completed another application in the office. He never called for an interview with Male about his application.

On July 12, Bono and Male met at an area restaurant. Bono asked Male to hire some union members for a new job; Male declined. Bono reminded Male about the applications and Male told him that he remembered one of the union applicants listing $30 as a previous hourly wage. Male then remarked: "You got to be kidding." Bono responded, "No, we're not kidding."

III. ANALYSIS

A. The Alleged Unlawful Refusals to Hire

To establish an unlawful refusal to hire, the General Counsel must prove that (1) the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the position for hire; and (3) animus toward protected activity contributed to the Respondent's decision not to hire the applicants. See *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).[5] If the General Counsel meets his initial burden, the burden shifts to Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id.

In the instant case, the judge found that, among the union applications at issue, only those submitted by the Aguilars on April 5 and by Bono on May 9 were valid.[6] He further found, and we agree, that the General Counsel established: (1) that Respondent was hiring on those dates and (2) that the Aguilars and Bono possessed experience or training relevant to the announced or generally known requirements of the position.[7] However, we disagree with the judge's finding that the General Counsel proved the third *FES* element, namely that antiunion animus contributed to Respondent's decision not to hire the applicants. Accordingly, the failure to hire the Aguilars and Bono was not unlawful.

First, there was no direct evidence of anti-union animus. The Respondent has no history of unfair labor practices. Other than the change in application procedure which, as discussed below, we find was lawful, there are no allegations of any independent violations of the Act in this case. Further, Respondent's officials involved in the hiring process did not make any statements manifesting animus. In this last respect, we reject the judge's view that Male's remark to Bono that he had "to be kidding" about the applicants' wage history supplies the requisite evidence of animus. The judge interpreted Male's remark broadly to mean that he did not take the union applications seriously. However, Male did not say that he believed all of the union applicants were "kidding" about their interest in employment; rather, he was referring to a wage rate of a single union applicant whose past wage rate of $30 an hour was well in excess of that earned by any of Respondent's employees, including superintendents. Moreover, Respondent accepted and processed many union applications, negating the interpretation drawn by the judge.

Second, we find that the judge erred in inferring antiunion animus from the fact that the Aguilars' applica-

[4] Bono testified that Male personally accepted the applications. Male denied doing so. The judge did not resolve this conflict in testimony. In any event, there is no evidence that Male was available to interview applicants that day.

[5] The judge did not analyze the case under the standard set out in *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). The judge's analysis, however, differs only slightly from the Board's *FES* standard and the parties fully litigated the *FES* issues.

[6] There are no exceptions to the judge's findings that the other applications were invalid and his dismissal of allegations of a refusal to consider or hire with respect to them.

[7] Member Schaumber is of the view that the General Counsel should be required to show, as part of his initial burden under *FES*, supra, that the applicant met the announced or advertised qualifications for the job, unless the employer is shown to have applied less rigorous standards in practice. See *CCC Group, Inc.*, 341 NLRB No. 15, slip op. at 2 fn. 2 (2004).

tions were not found in Respondent's files. We accept the judge's crediting of the Aguilars' testimony that they submitted applications on April 5 and that they interviewed with an unknown representative of Respondent, John Doe. However, even assuming that John Doe had the apparent agency authority to conduct a job interview, there is no basis upon which to infer that any of the Respondent's officials deliberately destroyed or misfiled the applications because the Aguilars belonged to a union.

Further support for this conclusion is the fact that during the period in question, Respondent received over 100 applications, including many submitted by union members, and there is no evidence that applications submitted by other union members could not be located.[8] Finally, there is no evidence suggesting that Respondent would have singled out the Aguilars for treatment different from that accorded other applicants.[9]

Similarly, we find that the judge improperly inferred anti-union animus from Male's screening of applications to exclude individuals who previously earned significantly higher wages than paid by Respondent. The judge is both factually and legally mistaken on this point. While Male testified that an applicant's high wage history would be a factor in considering whether the applicant was overqualified for an entry-level job ordinarily paying only $8 an hour, the record does not show that Respondent followed a policy of screening out all applicants whose past wages exceeded a certain level.[10] Further, even if Respondent had such a policy, it would not be per se unlawful. On the contrary, "a preference for hiring applicants who were accustomed to earning wages within the range the [employer] would pay" is "legitimate and nondiscriminatory." *Kelly Construction of Indiana*, 333 NLRB 1272 (2001). Accord: *Wireways, Inc.*, 309 NLRB 245, 246 (1992).[11]

Finally, the judge inferred animus from Respondent's failure to hire the three union applicants—Bono and the Aguilars—who completed valid applications on Respondent's premises. In reaching this conclusion, the judge apparently relied on an implicit finding that Respondent's reasons for not hiring them were pretextual. However, the reasons discussed by the judge were not the reasons asserted by Respondent. It did not hire the Aguilars because their applications never reached Male, the sole person responsible for hiring decisions. It did not hire Bono because he did not timely pursue an interview with Male about his applications. Accordingly, the judge's finding of pretext is not supported, and cannot be used to satisfy the General Counsel's initial *FES* burden of showing unlawful motivation.

B. The Alleged Change in Hiring Policy

We also find that Respondent did not violate Section 8(a)(1) by requiring applicants to complete applications on the premises. Even assuming, based on Morrison's June 15 statement to Bono, that the Respondent actually did make this change,[12] the General Counsel has failed to show it was motivated by an intent to interfere with the Union's organizing campaign, or that the change had the reasonable tendency to interfere with organizational activities. See, e.g., *M.J. Mechanical Services*, 325 NLRB 1098, 1108 (1998). All applicants would in any event have to come to Respondent's premises to interview with Male. Requiring that applications be completed on the premises imposes no obvious additional burden on any applicant, much less on a discrete group of applicants with union affiliations.[13] Therefore, we conclude that Respondent did not violate Section 8(a)(1) by changing its application policy.

[8] The judge's attempt to relate the absence of the Aguilars' applications in Respondent's files to the absence of the application that Bono allegedly filed on April 7 cannot be reconciled with evidence supporting the judge's own expressed doubt that Bono and Bell submitted applications on that date.

[9] Unlike the judge, Member Schaumber finds that the unknown person who was in Respondent's office, referred to as John Doe, was not a supervisor or agent of Respondent. In determining whether a person is an agent of another, the Board applies the common law principles of agency. See, e.g. *Electrical Workers Local 98 (MCF Services)*, 342 NLRB No. 74, slip op. at 3 (2004); *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001); *Cooper Industries*, 328 NLRB 145 (1999). There is no evidence that John Doe had actual or apparent authority. Apparent authority is established when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal authorized the alleged agent to do the acts in question. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that the principal's conduct is likely to create such a belief. *Electrical Workers Local 98*, supra; *Pan-Oston Co.*, supra. In Member Schaumber's view, there is no evidence that Cecil Male did anything to cloak Doe with apparent authority as a hiring agent.

[10] The judge's own findings suggest there was no such absolute exclusionary policy. "Agent" Doe was aware of the Aguilars' high wage history, yet he still discussed hiring them at wage levels above the standard entry wage.

[11] Member Liebman joins her colleagues in the dismissal of the complaint. She previously has questioned the *Wireways* standard as enforced in the construction industry. See *Northside Electrical Contractors*, 331 NLRB 1564 fn. 2 (2000); *Benfield Electric Co.*, 331 NLRB 590, 592 fn. 6 (2000). In this case, however, neither the General Counsel nor the Charging Party has argued that *Wireways* should be reexamined, and the General Counsel has provided insufficient evidence to support such a reevaluation here. See *Walton & Co.*, 334 NLRB 780, 780 fn. 2 (2001).

[12] We note that on June 15 Morrison accepted Bono's submission of applications, other than his own, prepared off-premise. In fact, there is no evidence that the Respondent has rejected any off-premise application.

[13] We note that in *M.J. Mechanical Services*, 325 NLRB 1098, 1108 (1998), the employer instructed its personnel to stop giving out copies of its application forms. Because this change in procedure was announced at a meeting called in response to the union's salting campaign, the Board inferred that the new procedure was motivated by a desire to make it more difficult for union members to apply. Here, there is no evidence that a desire to impede applications by Union members motivated Respondent's policy change, that Respondent failed to enforce the policy against nonunion applicants, or that the policy disadvantaged union applicants.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 21, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Dwight Kirksey, for the General Counsel.
Timothy J. Ryan, Esq., of Grand Rapids, Michigan for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Lansing, Michigan, on March 1 and 2, 2000. Subsequently, briefs were filed by the General Counsel and the Respondent. The proceeding is based upon a charge filed August 20, 1999,[1] by Local 70, United Union of Roofers & Allied Trades, AFL–CIO. The Regional Director's complaint dated November 30, 1999, alleges that Respondent Dalton Roofing Service, Inc., of Lansing, Michigan, violated Section 8(a)(1) and (3) of the National Labor Relations Act by changing its application policy on or about June 15, 1999, to require that applications be filled out only while present at Respondent's headquarters and by failing to hire 11 named individuals because of their membership in, activities on behalf of, and employment by the Charging Union.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged as a roofing contractor in the construction industry in Michigan. It has gross revenues in excess of $500,000 and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Michigan and it admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Cecil Male is the Respondent's owner, president and chief executive officer. The company is divided into seven operating divisions: (1) Built-Up Roofing ("BUR"); (2) Single-Ply Systems; (3) Modified Systems; (4) Shingles; (5) Sheet Metal; (6) Spray-in-place Polyurethane Foam Insulation and Coating System; and (7) Spray-in-place Polyurethane Foam Insulation and Gravel System and each division is staffed with a superintendent, foreman, and laborers who perform both roofing work and related less skilled general labor work, according to their experience and the company's needs.

The Respondent has been in the roofing contracting business since 1968. It is a merit company (nonunion) and has never had a bargaining relationship with any union. The highest-ranking employee working the BUR division is the superintendent, David Morrison. With the exception of the Sheet Metal Division (which lacks a superintendent), the other six divisions also included a superintendent, at least one foreman, and a number of laborers who make between $8 and $12 an hour.

The principal office employee is Cindy Morrison and she is owner Male's daughter as well as the wife of superintendent David Morrison. Cindy Morrison described the inside layout of Respondent's facility as a small empty foyer with a closed door straight ahead and a small sliding glass partition on the left wall that opens directly into her office. When people enter, Ms. Morrison steps up to the glass partition to see whether she can assist them. Her job duties include some initial responsibility for the application and hiring procedure (there is no written procedure), as well as responsibility for application retention and recordkeeping. She provides applications to interested parties and sometimes guides them to the kitchen area where they can complete the applications, and retrieves the applications after the applicants are finished. She often asks some basic questions such as whether the applicant possesses a valid driver's license and, if her father is in the building and available, she takes the applicant to his office and an interview occurs immediately. Superintendents sometimes sit in on interviews but owner Male asserts that he conducts all interviews and is the only individual who is "authorized" to do so or "authorized to hire or determine wage rates."

If Male is not available, the applicant is told to call back and arrange an appointment and she puts the application on Male's desk. When Male is through with an application, he returns it to Ms. Morrison, who places the application in a file which is kept for 1 year unless the applicant is hired, in which case she moves the application to an employee personnel file.

Prior to May 1998, Sam Bono worked for the Michigan State Building Trade and was never employed as a roofer. Upon leaving his prior job, he became director of organizing to Local 70 of the Roofer's Union. He was classified as a journeyman roofer based upon his position with the Union and obtained some minimal experience in built up, hot tar pitch, and rubber shingle roofing (work obtained as part of an organizing drive). In January, 1999 Bono read an article in a Michigan business magazine concerning the availability of construction workers which featured Respondent's president who was cited in the article as saying that he could hire about 100 roofers but he had to turn down work because he did not have enough workers. Thereafter, between February through September, 1999 Respondent ran newspaper advertisements in the daily Lansing State Journal seeking roofers. The February 19 ad was as follows: "ROOFING Full Time. Start now. Shingle work, Exp/train. Good wages/benefits.
(517–323–9160)."

After seeing the ad and recalling the magazine article, Bono and organizer Jim Bell went to the Respondent on March 30. They noticed a sign on the street around the corner from the

[1] All following dates will be in 1999 unless otherwise indicated.

Respondent that read "Dalton Roofing-Now hiring-" Bono and Bell went into the office wearing hats and jackets that were clearly embroidered with, "Roofers Local 70." Bono spoke to Ms. Morrison who was standing behind a glass partition and asked if Respondent was hiring. He was told, yes and asked for and received applications. Bono then asked if they could take the applications with them to fill out and return them later. Morrison agreed and when Bono asked how long the application would be considered valid Morrison said that the applications were only good for 30 days once they were submitted.

About April 5, journeyman roofers (and brothers) Adam and Raul Aguilar were in the union office and Bono told them that Respondent was hiring. They agreed to apply for work with Respondent and went to Respondent's office and asked for job applications. An unidentified, middle-aged woman behind the glass partition in the office gave each of them an application, asked them to fill it out and asked if they had any experience. Adam Aguilar boastfully told her that he was a "roofing machine." At this point a young man chuckled and appeared behind her glass partition. He asked the brothers to come to the back where he proceeded to question them together. Raul Aguilar was wearing the baseball cap with "Local 70 Roofers' Union" on the front and the interviewer noticed the cap and asked if they were union. They said yes and he asked, "why do you want to leave a union company to work for a merit company? Adam told him that they both live in Lansing but were working in the Ann Arbor-Detroit Area and they were sick of the drive. He then asked if they were familiar with various roofing systems and they answered that they were qualified to work and had worked on most of the roofing systems discussed. He then asked them what kind of wages they were looking for from Respondent. Adam responded that "anything reasonable would do" and Raul said "To tell you the truth, I'm not looking for any money. I'm looking for a job. The money is not an issue. The job is." Adam went on to say that he was open to any wage that was offered. The interviewer said Respondent started at $8–9/hr but if they knew how to roof they could make more and then mentioned a rate of $11 or $12 an hour for Raul and $13 an hour for Adam. He then said he would, "let the old man know and would get back to them within a week. Neither brother was contacted within that time and each called Respondent to follow up on his application. Raul asked to speak to someone about his application. A woman told him no one was present to speak to him. He then said he would appreciate a return phone call. The woman told him that she would pass his message on. Adam also phoned Respondent about a week after he was interviewed by Respondent. A woman answer and he told her that he had put in an application the prior week and wanted to know if he had the job or not. She took his name, phone number, and said someone would give him a call back. No one from Respondent ever called either of the Aguilar brothers and the Respondent's files did not have either of their applications.

On April 7, 2 days after the Aguilar brothers applied at the Respondent's office Bono and Bell returned to the Respondent and saw the roofer hiring sign still there. Bono testified that they turned in completed applications to the woman in the window that they had received on the 30th but did not make any copies.

The next day Wednesday, April 7, there was a regular union meeting and Bono asked for volunteers to apply for jobs with the Respondent and, in response seven Local 70 members, Ralph Teachout, Kirk Curry, Roman Baptiste, Herbert Tackett, Roy Shadowens, Matt Megar, and James Hoelzer filled out a Respondent job application form and returned it to Bono.

On April 13, Bono took in the seven applications[2] and, the now hiring sign was still up. Cindy Morrison looked them over and took them to the back of the building. She returned a couple of minutes later and told Bono there was no one there to talk to him. Bono gave a union business card to Morrison and told her to call him if any information was missing.

When owner Male saw the application later that day or the next he was "surprised" at the number of applications and then observed the page 2 of each application was not part of the company's application and there was no "certification" which is part of its regular application. He therefore made no effort to contact them (which he asserts is his regular policy) and waited for them to make a request for an interview.

On May 2, Bono returned to Respondent's office, asked if they were still hiring, and he obtained another job application form. He again did not fill out at that time but took it back to the union office and photocopied the complete application. He then realized that the application differed from the applications he had previously turned in. He requested verbal permission from the Local 70 applicants to transfer the information from their April 1999 applications to the new application form and he did so. He also signed each application himself (with each applicant's respective name). On May 11 (the now hiring sign was still up), Bono took the set of seven completed applications one for himself and one for Bell and assertedly gave owner Male the updated applications and gave him his card and told him to call him if any information was missing and he would supply it. Male assertedly took the applications and said he would give Bono a call.

Although Male acknowledged that he met with Bono at a restaurant on a latter occasion (on July 12), he asserts that he never saw him at the Respondent's facility. He did see the new applications on his desk, however, and began to review them. He recognized them as something he had seen before and he got the old applications, reviewed both sets and noticed they were proper and complete (with the certification agreement). He then compared the new signatures with those on the noncertification part of the original applications and saw that all of the new applications were in the handwriting of one person rather than being signed with separate, individual signatures. Among other things Male concluded that the handwriting of the signature made the truthfulness of the applications suspect and he sent the applications to be filed and made no attempt to contact any of the applicants.

On June 15 Bono took in updated applications of the same seven Local 70 members and one for himself and Bell (these were exactly the same as the improperly signed applications from May 11, except for a new date on each to reflect Bono's attempt to keep the applications within the Respondent's 30-day currency policy). Morrison told Bono that Respondent had a new policy that required applications be filled out only in the office. Bono asked to talk to owner Male but he was not in. Bono asked him to call and left. However, he returned a few minutes later, filled out an application on the premises, and left that application. He was not called for an interview.

[2] All seven applicants have worked for well-known union employers and their applications showed that. Six of the seven were journeymen roofers and the sixth was an apprentice 7th class.

On July 12, Bono and Male met at a Lansing area restaurant. Bono asked if Male would hire some of his members on his new job at the General Motors Corporation plant, at the Demer Building in Lansing. Male declined. When Bono reminded him that applications for employment had been submitted, Male told him that he remembered an applicant getting $30 an hour at his last job and said that "you got to be kidding." Bono responded, "No, we're not kidding." Male had reviewed Bono's application and concluded that he was not the type of person he was looking for and, otherwise there is no indication Bono's qualifications were discussed at the July 12 meeting.

During the summer and into the fall of 1999 Respondent continued to perform roofing work at various jobsites in Central and Southwestern Michigan. Bono and Bell visited several of these jobsites and spoke with some of the Respondent's crews. The work these crews were performing was work that apprentice and journeymen roofers normally do. Between April 5 and the end of the year, the Respondent hired over 65 new employees to do this roofing work.

Discussion

Here, the General Counsel contends that the Respondent's refusal to hire several alleged applicants for roofer positions was motivated by antiunion considerations and that it also illegally changed its policy to require applicants to personally fill out applications at its facility.

A. Refusal to Hire

The Board enforces a causation test for cases turning on employer motivation, otherwise, the foundation of Section 8(a)(1) and (3) "failure to hire" allegations rest on the holding of the Supreme Court that an employer may not discriminate against an applicant because of that person's union status, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185–187, U.S. Ct. 845 (1941).

Based on the decision in *Norman King Electric*, 324 NLRB 1077 (1987), affirmed 177 F.3d 430 (1999), and the test set forth in *Fluor Daniel, Inc*., 304 NLRB 970 (1991), and *KRI Constructors*, 290 NLRB 802, 811 (1988) and cases cited therein. The General Counsel is required to meet an initial burden of proof and establish that (1) an individual files employment application, (2) the employer refused to hire the applicant, (3) the applicant is or might be expected to be a union supporter (4) the employer has knowledge of the applicant's union sympathies, (5) the employer maintains animus against union activity, and (6) the employer refuses to hire the applicant because of such animus. If the General Counsel does so, the employer must establish that for legitimate reasons the applicant would not have been hired absent the discriminatory motive.

This proceeding arises in the jurisdiction of the United States Court of Appeals for the Sixth Circuit and, as in the *King Electric* case supra, I find that the record here meets the requirement of the court's test set forth in *NLRB v. Fluor Daniel, Inc*. 102 F.3d 1818 (6th Cir. 1996), and is consistent with the Board's recently modified test set forth in *Thermo Power*, 331 NLRB 9 (2000).

Criteria number (1) presupposed that the General Counsel showed that valid applications were filed and here, with the exception of applicants Adam Aguilar, Raul Aguilar, and Sam Bono, I find that no such showing has been made.

Organizer Bono's efforts to act on behalf of his Union's membership clearly are protected and his and Bell's status as paid union employees does not adversely affect their status as job applicants and, accordingly, I find that consistent with the Board and the Supreme Court's decision in *NLRB v. Town & Country Electric*, 116 S. Ct. 450 (1995), all the alleged applicant-discriminatees are bona fide applicants.

Bono's attempt on behalf of others, however, were subject to a series of misadventures that resulted in a clear failure to place valid applications before the Respondent and I find that there is no indication that the Respondent has made a practice of accepting flawed applications or of seeking out applicants in order to correct discrepancies. Accordingly, the Respondent had no burden or responsibility to act on the Union's behalf or to remedy the Union's failure s in this regard. The first group of applications filed on behalf of asserted applicants Teachout, Curry, Baptiste, Tackett, Shadowens, Megar, and Hoelzer, as well as organizer Bell and Bono, were filed on a form with the proper first page but with a second page photocopied from some other contractor's application form and mistakenly (by Bono) attached. These applications also lacked the certification page and signature that is a legitimate and necessary part of the Respondent's application form and therefore these applications, generally submitted in April, are not shown to be valid.

The applications submitted by Bono in May on behalf of the others were on the proper form and had a signed certification, however, the signatures were admittedly and obviously not the signatures of the individuals whose name they purported to be. Bono's receipt of verbal authorization is not shown to remedy the defect or to make the signature anything other than forgeries that act to invalidate the documents, especially the certification section.

Under these circumstances, I find that the General Counsel has not met his initial burden as to the above discussed applicants and, accordingly, I find that the complaint should be dismissed in relevant part.

Turning to the applications of brothers Adam and Raul Aguilar, I find that they testified in a clear and believable manner and, based upon the overall credibility of their testimony I credit them over the Respondent's witness. I conclude that they filed applications as they described under circumstances that otherwise establish a violation of Section 8(a)(3) of the Act. Based upon my observation of each witnesses' demeanor and my evaluation of the apparent circumstance and the overall record, I find that the brothers did go to the Respondent's office on April 5, filled out applications and then had a conversation in the nature of an interview with an unidentified "John Doe," a person who displayed apparent authority to speak on the Respondent's behalf.

Male testified that there was no one in "the office area" that wore a cap or fit the description of the person who the Aguilars described as the person who called them to the back for an interview. He then said he had no idea who it could be but admitted that "people" would come into the office with a cap but "not part of any management or (who), conducting interviews or, anything like that."

While Raul Aguilar's recollection of events was not always clear, it is apparent that he basically was following along with his brother, Adam, who displayed a generally detailed recall of significant events. Raul, on cross examination, and in response to persistent prodding by counsel, was generally consistent in his testimony that he didn't recall details of what the woman in the office looked like and the probability that he might not have filled out the application in a chair in the reception area, as he

recalled (the Respondent assert the area had no chairs), does not significantly affect or disqualify his recall of filing an application and being interviewed by "John Doe." Raul's testimony essentially cooberates that of his brother Adam who was the spokesperson for the two (and who did not recall any chairs in its lobby area), and I credit their testimony that they filled out applications as well as the contents of their conversation with "John Doe."

Otherwise, I find the testimony of Cindy Morrison that she did not see either brother (and about who might be in the office) was unpersuasive and not controlling proof that the brothers did not appear there. In a similar vein, I find owner Male's testimony regarding no one in the "office area" wearing a cap or being "part of management authorized to conduct interviews" to be evasive or deceptive and I find that his testimony does not refute or discredit the testimony of the brothers. Male otherwise testified that he had seven operating divisions each (except for some duplications) with a supervisor and a foremen. No attempt was made to specifically describe these persons or to show that none of them fit the description of "John Doe" provided by the brothers. Under these circumstances, I find that one of those supervisors or foremen was a person who likely could come into the office with a cap on.

Based on the overall record I find that, "John Doe" was a supervisor or foremen who happened to be in this area when Adam Aguilar bragged that he was "a roofing machine." I further find that he invited them to an office area with roofing manuals, where he looked over their applications, interviewed them in the manner they described (with questions about experience, Raul's union hat, and pay), and where he also took a phone call and answered someone's question.

Even if this person had no actual authority to conduct an interview, I infer that one of the foremen or supervisors took it upon himself to do so and he acted in such a manner and under surrounding conditions that he displayed apparent authority. He acted as Respondent's agent and I find that the Respondent is responsible for his conduct and actions.

This apparent authority is especially true in view of John Doe's closing remarks that he would check with their former employers, "let the old man know," and get back to them within a week. As noted, the Respondent did not have either Adam's or Raul's application in its files and, under the circumstances, I infer that no one followed through with owner Male's practice of forwarding applications to Ms. Morrison for filing or that the applications were intentionally discarded. Coincidentally, organizer Bono assertedly returned to the Respondent's facility 2 days later with applications (but with the wrong second page), that he and Bell had completed and these applications also were not on file although those brought in by Bono on April 13 and thereafter were.

On May 9, Bono filed a complete application on his own behalf and with his own signature and certification. The application stated he had not applied to the company before which calls into question whether he correctly recalled having filed application on his behalf on April 7. Bell recalled going to the Respondent's facility with the application (flawed) copied from his visit the previous week and that Bono dropped them off. He also recalled making out and signing another "different" application, which he dated May 12. However, he did not sign or date the attached certification. Accordingly, I find no valid application for organizer Bell.

In summation, I conclude that the record shows valid applications filed on April 5 by Adam and Raul Aguilar and on May 9 by Bono. Turning to the remaining refusal to hire criteria, I find that the Respondent refused to hire these applicants even though they were qualified for the job and it was advertising for and hiring roofers at this time (3) the applicants overtly displayed their union affiliation by wearing union paraphernalia announcing their affiliation and leaving business cards. With regards to criteria (4), it appears that the Respondent does not dispute the fact that it was aware of the Union's involvement.

The Respondent contends that there was no union animus, criteria (5), in the change or development of its hiring policy, and the Respondent president presents the appearance of a benign attitude towards unions, however, it is unnecessary for the General Counsel to show blatant actions on the part of an employer in order to demonstrate antiunion animus and here the Respondent does not persuasively show valid reasons why it would not consider calling applicants for interious just because they applied when he was not there or had someone else deliver his application. Here, the Respondent's animus toward union applicants can be interred by its initial failure to file the applications first filed by the Aguilar brothers and Bono and its attempts to disclaim their visit to its facility. Also, as found below, after several union attempted findings it also changed its practice of accepting prefilled out applications by requiring applications to be filed out only on the premises. I also find that owner Male's expressed disqualifying criteria in screening applications to effective exclude those with past experience at (high) union wages, effectively precludes union employees and, accordingly, I find that animus otherwise is implicit in the discriminatory practices found here and can be found here even without specific proof of antiunion motivation, see *J.E. Merit Constructors,* 302 NLRB 301, 304 (1991), and *Great Dane Trailers,* 388 U.S. 26, 34 (1967).

Lastly, (6) I find that the record is sufficient to support an inference that the Respondent antiunion animus was a motivating factor in its decision to fulfill its advertising and admitted hiring needs based upon its treating all Union-related applications as a joke or as "kidding" by the Union, not considering union journeyman because they are "overqualified" and failing to hire even union applicants who submitted complete valid, applications filed out on its premises.

The Respondent's defense is directed at owner Male's conclusion that "all" of the applicant's were overqualified, were not appropriate candidates for Respondent's positions, most generally starting positions at $8 an hour, and his conclusion that he would not have hired any of them because of this.

This argument fails for several reasons. First, as noted in the *King Electric,* case, supra at page 1085, factors such as a desire not to commute long distances (as expressed by the Aquilar brothers) can influence an applicant's willingness to accept a lesser wage than he previously earned and a union applicant cannot automatically be disqualified because of an employer's opinion of his wage expectations. Here, and as in the *King Electric* case, a Respondent's use of this excuse for not hiring appears to be pretextual and indicative of an unlawful motive. In any event, the unrefuted testimony of the Aguilar brothers shows that the Respondent's apparent agent (a probable supervisor or formen), discussed wage rates that were acceptable to them and were rates driven by experience (starting at $8 or $9 an hour), but because of their experience they could get $11 or $12 per Raul and $13 an hour for Adam.

Paradoxically, if Bono had been interviewed it would have been discovered that, indeed, he was not overqualified but was a sheet metal worker by trade with only a few weeks of actual experience in the roofing trade. Thus, he would have been a perfect match for the Respondent's asserted desire to hire basically inexperienced individuals.

A. It's Newspaper Ad

Although, the Respondent argues on brief that it wanted inexperienced applicants, the ads can be read to indicate that the Respondent wanted both applicants who need training and applicants who are experienced (who would get top pay). Accordingly, I find that this is another example of pretext indicative of an unlawful motive.

Here, the record shows that Bono and the Aquilar brothers were valid applicants qualified for the positions sought in the Respondent's ads and that they were specifically ignored and not hired even though the Respondent continued to run ads and to hire numerous employees during the applicable period in 1999. Under these circumstances I find that the Respondent has failed to persuasively rebut the General Counsel's showing of unlawful motivation and, accordingly, I find that the General Counsel has met its overall burden and shown that the Respondent's failure and refusal to consider and hire Bono and Adam and Raul Aquilar violated Section 8(a) (3) and (1) of the Act, as alleged.

B. Change in Application Procedures

The Respondent admits that it had a 2'x3' sign saying "Dalton Roofing Service" with one arrow pointing to its facility. The sign was on someone else's property (with permission) and had a smaller sign saying "Hiring" hanging from a chain. The entire sign was removed in July at the request of the new owner after the property was sold, and under these circumstances, I find nothing improper in these actions. About the same time, however, the Respondent changed its practice of allowing applicants to take applications away to fill them out and return them later and I find that this was in response to the Union's application filing efforts. See *M.J. Mechanical Services*, 325 NLRB 1098 (1998).

Morrison specifically told this to organizer Bono when he was attempting to update a group of applications and she asserted that this was done so that applicant's could receive an interview from her father "if they came in to Dalton's offices on a day when Mr. Male was available."

Thus, it clearly was in response to the Union's activities and, rather than merely being "helpful," it reinforced the Employer's asserted practice of not calling applicant's for interviews, a practice that made it more difficult for union applicants to apply for work and the clear result was to interfere with the Union's salting campaign. See *M.J. Mechanical Services*, supra. The Respondent offers no other, independent reason for its action and, accordingly I find that it is shown to have violated Section 8a(1) of the Act in this respect, as alleged.

IV. CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to consider for employment or refusing to employ job applicants for the position of roofer because they are members of the Union or for their union sympathies, Respondent discriminated in regard to hire in order to discourage union membership in violation of Section 8(a)(3) and (1) of the Act.

4. By changing its practices to require that applications to be filed out only in the office, the Respondent has violated Section 8(a)(1) of the Act.

5. Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

V. REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

It having been found that the Respondent unlawfully discriminated against job applicants Sam Bono, Adam Aguilar, and Raul Aguilar, it will be recommended that Respondent offer these applicants employment and make all of them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3] See also *Dean General Contractors*, 288 NLRB 573–574 (1987). Otherwise, it is not considered necessary that a broad Order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Dalton Roofing Service, Inc., Lansing, Michigan, its officers, agents successors and assigns shall

1. Cease and desist from

(a) Requiring that application be filed out only in its office.

(b) Refusing to consider for employment or refusing to employ job applicants for the position of roofer because they are members or sympathizers of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the act.

(a) Rescind its policy of requiring all applications to be filled out in its office.

(b) Within 14 days from the date of this Order, offer Sam Bono, Adam Aguilar, and Raul Aguilar, employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent position without prejudice to their seniority or other rights or privileges to which they would have been entitled absent the discrimination and make them whole for any loss of earnings they may have suffered by rea-

[3] Under New Horizons, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[4] If no exceptions are filed as provided by Sec. 10246 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

son of the discrimination against them as set forth in the "Remedy" section of this decision.

(c) Within 14 days from the date of this Order remove from its files and remove any and all references to the unlawful refusals to hire and consider for hire the discriminatees named above and within 3 days thereafter notify the discriminatees in writing that this has been done and that the refusals to hire and consider for hire will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days of service by the Region, post at its Lansing, Michigan, facilities and all current jobsites copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being singed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to the named discriminatees, and all current employees and former employees employed by the Respondent at any time since April 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. May 25, 2000.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to consider for employment or refuse to employ job applicants for the position of roofer because they are members or sympathizers of the Union.

WE WILL NOT require that application be filled out only in our office.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our policy of requiring application to be filled out only in our office.

WE WILL, within 14 days of the date of the Board's Order offer Sam Bono, Adam Aguilar and Raul Aguilar employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions and we will make them whole for any loss of earnings they may have suffered by reason of the discrimination against them.

DALTON ROOFING SERVICE